Supreme Court, U.S.
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IN THE

Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

and

TEAMSTERS LOCAL UNION 657,
Petitioners,

v.

OVERNITE TRANSPORTATION COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED

Whether an employer's state law claim of tortious interference with customer relations, based on unions' peaceful distribution of handbills containing allegedly defamatory statements, is preempted by Sections 7 and 8(b)(4) of the National Labor Relations Act, Title 29 U.S.C. §§ 157 and 158(b)(4), under the broad preemption doctrine enunciated in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959)?

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IN THE

Supreme Court of the United States

No. ____

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

and

TEAMSTERS LOCAL UNION 657,

Petitioners,

v.

OVERNITE TRANSPORTATION COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

International Brotherhood of Teamsters, AFL-CIO and Teamsters Local Union 657 pray that a writ of certiorari issue to review the decision and judgment of the Texas Supreme Court (and in the context of the Texas Supreme Court's refusal of review, the decision and judgment of the Court of Appeals for the Third District of Texas) in *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and Teamsters Local Union 657 v. Overnite Transportation Company*, No. 01-0393 (Supreme Court of Texas) (September 20, 2001).

DECISIONS BELOW

The decision of the Supreme Court of Texas denying petition for review was without opinion and is not reported. It is reproduced as Appendix C in the appendix to this Petition ("Pet. App.") at 11a-12a. The Opinion and Judgment of the Court of Appeals for the Third District of Texas in Case No. 03-00-00390-CV, dated March 29, 2001, is unreported and unpublished, and is reproduced as Appendix B at Pet. App. 3a-10a. The Texas State Trial Court's Order Granting Partial Summary Judgment in Cause No. 99-11702, dated February 24, 2000, is unreported and unpublished, and is reproduced as Appendix A at Pet. App. 1a-2a.

STATEMENT OF JURISDICTION

The Supreme Court of Texas' judgment denying petition for review was entered on September 20, 2001. This Court has jurisdiction under Title 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, Title 29 U.S.C. § 157 governs the right of unions and employees to engage in peaceful organizational activity. Its full text is set out in Appendix D at Pet. App. 13a.

Section 158(b)(4) of the National Labor Relations Act, Title 29 U.S.C. § 158(b)(4) governs unions' right to make peaceful appeals to third parties in the context of a labor dispute. Relevant text is set out in Appendix D at Pet. App. 13a-14a.

STATEMENT OF THE CASE

A. Proceedings In The State Trial Court

1. *Introduction.* This case arose out of an ongoing, nationwide labor dispute between Overnite Transportation Company ("Overnite"), various teamster local unions

including Petitioner Local 657 ("Local 657") and Petitioner International Brotherhood of Teamsters, AFL-CIO ("IBT"). (CR 2-7).[1] The dispute involved teamster local unions' campaign to organize Overnite employees and to negotiate an initial collective bargaining agreement with Overnite.

2. *Proceedings in the State Trial Court.* Overnite sued IBT and Local 657 alleging claims of defamation and tortious interference with customer relations based on the unions' peaceful distribution of handbills (fliers) to Overnite's Texas customers. (CR 2-7). The handbills stated (falsely, Overnite alleged) that the National Labor Relations Board had found Overnite guilty of hundreds of labor law violations, including discrimination, intimidation and retaliation against workers. (CR 6). Overnite contended that distributing the allegedly defamatory handbills to its customers injured its business relations and contracts. (CR 7).

Local 657 and IBT moved for summary judgment on Overnite's tortious interference claim, contending that their acts were justified and that in any event the National Labor Relations Act preempted Overnite's claim. (CR 24-25, 47-49; Pet. App. 5a). The trial court granted the Motions for Summary Judgment without stating its ground and severed the tortious interference claim, making the partial summary judgment as to Overnite's claim of tortious interference final for appeal. (CR 30; Pet. App. 1a-2a, 5a). Overnite appealed.

B. The Decision Of The State Court Of Appeals

The State Court of Appeals ("Court of Appeals") acknowledged the general, controlling principle articulated by the United States Supreme Court: "'[w]hen an activity is

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[1] Reference to the record in the Texas Court of Appeals for the Third District is by the notation "CR" followed by pagination. References to the Court of Appeals' Judgment and Opinion are by the notation "Pet. App." followed by pagination.

arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.' *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959)." (Pet. App. 8a). However, the Court of Appeals then determined that IBT and Local 657 had failed to establish that Overnite's claim of tortious interference was preempted because: (a) they "were required [and failed] to show that handbilling based on defamatory statements is protected"; and (b) although they cited authority analyzing whether certain union activities are prohibited under Section 158, they had "fail[ed] to articulate a cogent legal basis for preemption." (*See* Pet. App. 9a). The Court of Appeals concluded that IBT and Local 657 had "not carried their burden to show that they are entitled to judgment on that ground [preemption] as a matter of law." (Pet. App. 9a). On this rationale, the State Court of Appeals reversed and remanded the District Court's grant of summary judgment on behalf of IBT and Local 657 against Overnite's claim of tortious interference. (Pet. App. 10a). IBT and Local 657 filed a Petition for Review with the Supreme Court of Texas.

C. The Texas Supreme Court's Refusal To Review

The Supreme Court of Texas denied without opinion the Petition for Review filed by IBT and Local 657, presenting a final judgment for purposes of review by this Court on Petition for Writ of Certiorari.[2]

REASONS FOR GRANTING THE WRIT

In the context of the Court of Appeals' holding that Overnite's claim of tortious interference with customer

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[2] No review was sought as to the Court of Appeals' disposition concerning the affirmative defense of justification.

relations is not preempted by the National Labor Relations Act, this case presents an important, unresolved issue which should be considered and decided by this Court.

I. Law Governing The National Labor Relations Act's Preemption Of State Court Claims.

The controlling framework for determining whether particular state law claims are preempted by the National Labor Relations Act was established by the United States Supreme Court in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-45 (1959). It is for the National Labor Relations Board, and not the courts, to decide whether a particular controversy falls within the scope of sections 7 or 8 [3] of the National Labor Relations Act:

> At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board.
>
> . . . .
>
> . . . In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction.

Garmon, 359 U.S. at 244-46. Quoting *Garmon*, the Fifth Circuit in *Kaufman, et al. v. Allied Pilots Association,*

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[3] Sections 7 and 8 of the National Labor Relations Act are codified as Sections 157 and 158 respectively of Title 29 of the United States Code. *See* Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 157, 158 (West 1998). Section 157 of the Act confers rights on employees regarding labor organizations, while Section 158 describes unfair labor practices by both employers and labor organizations.

et al., No. 00-11223, 2001 WL 1485575 (5th Cir (Tex.)), in finding a state tortious interference with contract claim preempted, stated:

> Preemption is necessary because "the exercise of state power over a particular area of activity threaten[s] interference with the clearly indicated policy of industrial relations . . . ." [*Garmon*, 359 U.S. at 243]. Concerned with "conflict in its broadest sense" the Court eschewed a focus on the type of state regulation or claim, and adopted an approach that looks to the "nature of the activities which the states have sought to regulate." [*Id.*]

Kaufman, 2001 WL 1485575 at *2.

Clearly, the preemptive principle is a broad one [4]—broader than the Court of Appeals acknowledged. Contrary to the statement of the Court of Appeals, preemption is *not* dependent on initial "proof" in the trial court that the subject

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[4] *Garmon* carved out two limited exceptions to the preemption doctrine. *Garmon*, 359 U.S. at 243-44. *See also Kaufman*, 2001 WL 1485575 at *2. First, the *Garmon* Court stated that preemption would not attach to conduct which "touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of a power to act." *Garmon*, 359 U.S. at 244. These cases will typically involve "conduct marked by violence and imminent threats to the public order." *Id.* at 247. *See also United Auto Workers v. Russell*, 356 U.S. 634 (1958). There is no allegation of violence in this case. The second exception recognized by *Garmon* relates to conduct which is of "merely peripheral concern to federal labor law." *Garmon*, 395 U.S. at 243. An example is seen in *Linn v. Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), where a claim that a union maliciously defamed a managerial employee in the course of an organizational campaign was characterized as of "merely peripheral concern to federal labor law." *Id.* at 61. Peaceful union persuasion of an employer's customers in the course of a labor dispute cannot fairly be characterized as "merely peripheral . . . to federal labor law." As discussed in the text, *infra*, pp. 7-10, Sections 7 and 8(b)(4) directly regulate such conduct.

activity is protected. "*Garmon* preemption does not depend on the merits of an adjudication of the conduct's legality under federal law . . . ." *Kaufman*, 2001 WL 1485575 at 3. By requiring proof on the merits that the activity was protected before it would find preemption, the Court of Appeals usurped the authority Congress gave to the National Labor Relations Board to determine what conduct is protected by federal labor law. This is exactly what state courts are prohibited from doing by *Garmon* and its progeny.

II. Peaceful Handbilling In The Context Of Union Organizational Activity, Such As That Involved Here, Is Activity Presumptively Protected By Section 7 Of The National Labor Relations Act, And Is Subject To Regulation By The National Labor Relations Board In Interpreting And In Applying Sections 7 And 8 Of The Act.

Peaceful handbilling conducted by union representatives and members in the context of an organizational campaign or labor dispute has historically been regarded as presumptively within the protection of Section 7 of the National Labor Relations Act. *See, e.g., Lechmere, Inc. v. National Labor Relations Board*, 502 U.S. 527, 531-37 (1992); *National Labor Relations Board v. Babcock & Wilcox, Co.*, 351 U.S. 105, 109-113 (1956). In analyzing the legality of handbilling when directed to customers or consumers of a primary employer (such as Overnite) with whom a labor dispute exists, attention has been turned to the "proviso" [5] to Section

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[5] The referenced statutory wording (the proviso to Section 8(b)(4)) states in relevant part: "nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer . . . ." 29 U.S.C. § 158(b)(4).

8(b)(4) of the Act stating that union appeals to such persons (customers or consumers) are not prohibited if they "truthfully advise" of the nature of the dispute with the primary employer. In dealing with the ultimate legality of peaceful handbilling directed to or concerning customers or other employers doing business with a primary employer such as Overnite, the National Labor Relations Board ("the Board") and Supreme Court have applied the publicity proviso and have determined whether the handbilling is "protected" by the publicity proviso or instead "coercive" in violation of Section 8(b)(4).[6] *See generally Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 578-88 (1988); *National Labor Relations Board v. Servette, Inc.*, 377 U.S. 46, 54-56 (1964). *See also Hospital and Service Employees Local 399*,

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[6] The Court of Appeals cited *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 190 (1978) for the proposition that the preemption doctrine is applied differently depending upon whether the conduct is "arguably prohibited" or "arguably protected." (CR 4-5). Asserting, albeit incorrectly, that IBT based its claim for preemption only on the "arguably protected" nature of the conduct at issue, and that IBT only cited cases addressing "arguably prohibited" conduct, the Court of Appeals concluded that IBT had "fail[ed] to articulate a cogent legal basis for preemption . . . ." (CR 5). However, even assuming IBT's claim to preemption rested only on the arguably protected nature of the conduct, there exists no basis in *Sears* or elsewhere in this Court's jurisprudence to conclude that the preemption doctrine is applied differently depending upon whether the conduct at issue is arguably protected or arguably prohibited. "The fundamental precept of *Garmon* is that liability under a state cause of action is preempted whenever it poses a serious risk of *conflict* with national labor policy." *Mobile Mechanical Contractors v. Carlough*, 664 F.2d 481, 487 (5th Cir. 1981) [emphasis added]. That potential for conflict exists whether the conduct at issue is arguably protected or prohibited. As the Fifth Circuit noted in *Kaufman*, when state regulation of conduct poses a risk of conflict with federal labor policy "both prohibited and protected conduct are shielded from liability under state law." *Kaufman*, 2001 WL 1485575 at *3.

293 NLRB 602, 602-03 (1989), on remand from *Hospital and Service Employees Local 399 v. NLRB*, 743 F.2d 1417 (9th Cir. 1984). In the context of determining whether or not handbilling "truthfully advises" interested parties and is therefore entitled to the protection of the publicity proviso, the Board itself has suggested that whether or not information contained in a handbill is "false or misleading" may be relevant and has analyzed such allegations and content in determining whether or not use of the information tended to be misleading as to the nature of the primary dispute. *See Hospital and Service Employees Local 399*, 293 NLRB at 602 n. 3:

> In the absence of evidence that the information itself was false or misleading, the Board presumed that the CAB and NTB handbill data was factually accurate. However, the Board found that the use of the information tended to be misleading as to the nature of the primary dispute. See 263 NLRB 997 fn. 7 and 998. In affirming the Board's conclusion that the handbills were not protected by the publicity proviso, the court of appeals found it unnecessary to decide this latter issue. [*Hospital and Service Employees Local 399*], 743 F.2d at 1425 n. 5.

The Board continues to analyze the truth or falsity of handbilling information in determining whether the handbilling is "protected" on the one hand or "prohibited" on the other. *See Iron Workers Local 386*, 325 NLRB No. 141, 158 LRRM 1180 at 1186 (1998), enforcement denied on other grounds, 182 F.3d 948 (D.C. Cir. 1999). Clearly, analysis of the truth or falsity of the contents of peaceful handbilling directed at the customers of a primary employer (such as Overnite) is very much the grist of the National Labor Relations Board's mill in analyzing whether such handbilling is protected by Section 7 and the publicity proviso to Section 8 on the one hand, or prohibited by Section 8 on the other. The Court of Appeals' analysis does not acknowledge

the Board's ongoing interest in the truth or falsity of peaceful handbill content, and does not apply preemption law in that context.

III. Existing Case Decisions Have Not Squarely Addressed And Resolved The Preemption Issue Presented Here.

In *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966), the United States Supreme Court held that a state court *libel* action was not preempted, although based upon statements made by a union during a union organizing campaign. But the Supreme Court in *Linn* very carefully restricted the holding of that case to its facts: "[t]he question before us . . . involve[s] the extent to which the National Labor Relations Act, as amended, supersedes state law with respect to *libels* published during labor disputes." *Id.* at 57. (Emphasis added). The limitation of the Court's holding to libel actions was repetitively stated. *Id.* at 58, 67. Here, Overnite receives full benefit of the holding in *Linn* by the continued pendency of its defamation claim in the District Court.

Nothing in *Linn* addresses a separate claim of tortious interference with customer relations—a claim which focuses on union handbilling addressed to and concerning the customers of Overnite. As shown above, a claim grounded in peaceful union organizational handbilling addressed to the customers of the primary employer, with whom the union has a labor dispute, has typically been the topic of Board and Court analysis in determining whether or not such handbilling is protected by Section 7 and Section 8's publicity proviso on the one hand or prohibited by Section 8 on the other.

This Court has long held that federal labor law displaces state law and claims as to peaceful picketing activity directed at an employer's customers. *See Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964). We know of no decided case

which squarely addresses and decides whether or not an allegation that peaceful union handbilling contains (allegedly) malicious, defamatory statements saves a state court claim of tortious interference with customer relations from *Garmon* preemption. Three (3) existent cases, *B E & K Construction Co. v. United Brotherhood of Carpenters*, 90 F.3d 1318, 1328-30 (8th Cir. 1996), *Mobile Mechanical Contractors v. Carlough*, 664 F.2d 481 (5th Cir. 1981) and *Hennepin Broadcasting Associates, Inc. v. N.L.R.B.*, 408 F. Supp. 932, 937 (D.C. Minn. 1975), hold that claims of tortious interference based upon peaceful picketing appeals to third parties are preempted; however, none involves or treats allegations that the appeals contain malicious, defamatory statements or information.

A case decided by the United States Court of Appeals for the Third Circuit is instructive. In *Pennsylvania Nurses Ass'n v. Pennsylvania State Educ. Ass'n*, 90 F.3d 797 (3d Cir. 1996), one nurses' union sued another on the basis that the second union had "promulgated false, malicious, and defamatory propaganda designed to destroy the reputation of [the first union]" in the context of a union organizational campaign involving the competing unions. *Id.* at 800. The district court held that state court claims of defamation were *not* preempted, but determined that claims alleging "interference with present and prospective contractual relations" between the allegedly defamed union and former representatives, local units and contracting employers *were* preempted. The Third Circuit carefully analyzed existing law governing preemption under the National Labor Relations Act, and the nature of the state court tort claims involved, emphasized that the alleged wrongful conduct occurred in the context of an organizing campaign, and concluded that the state court tort claims involving interference with contractual relations: (1) involve activity actually or arguably prohibited by the National Labor Relations Act; (2) did not involve an issue deeply rooted in local feeling and responsibilities; and

(3) would risk substantial interference with the jurisdiction of the National Labor Relations Act were it litigated in the state courts. *Id.* at 801-05. The Third Circuit panel majority then *affirmed* that state tort claims of interference with contractual relations based on allegations of "malicious, defamatory statements" *were* preempted. *Id.* at 805.[7]

In *Pennsylvania Nurses Ass'n*, the Third Circuit recognized the separability of state court libel/defamation claims governed by *Linn* on the one hand and tortious interference with third-party relations on the other. The Third Circuit also recognized that the National Labor Relations Act broadly regulates a union's peaceful conduct in the context of a union campaign—and that state regulation of such conduct should not be extended beyond *Linn*. Whether or not this Court ultimately agrees with the preemption analysis of the United States Court of Appeals for the Third Circuit in the referenced case, that decision involves state court tort claims strikingly similar to Overnite's claim of tortious interference with contractual relations, and proves that a substantial question worthy of review is presented.

IV. Summary.

The bottom line is this: the union conduct at issue—peaceful, written persuasion of the customers of an employer with whom the union has a labor dispute—has been regulated by Congress in Sections 7 and 8(b)(4) of the NLRA. Overnite, and the State Court of Appeals, seek to displace the National Labor Relations Board's power to adjudicate claims based on this conduct by the artifice of a particular state cause of action—tortious interference with customer relations. Any defensible state interest in regulating this subject matter—

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[7] At the same time, the Third Circuit declined to find that a state claim of defamation was preempted, applying *Linn* narrowly as we have suggested it should be. *See Pennsylvania Nurses Ass'n*, 90 F.3d at 805-06.

recognized by *Linn*—is preserved by the libel/defamation claim which continues to pend in state court. The exercise of state jurisdiction over the separate claim of tortious interference with customer relations offends basic *Garmon* principles. A writ must be granted to resolve this issue and redress this wrong.

CONCLUSION

For the reasons stated, a Petition for Writ of Certiorari to the Supreme Court of Texas should be granted.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT
OF TRAVIS COUNTY, TEXAS
201ST JUDICIAL DISTRICT

CAUSE NO. 99-11702

OVERNITE TRANSPORTATION COMPANY,
Plaintiff,

VS.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

and

TEAMSTERS LOCAL UNION 657,
Defendants.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

On the date set forth below, came on to be considered the Motion of Defendant Local 657 for Partial Summary Judgment with respect to Count III of Plaintiff's Original Petition alleging tortious interference with contract. Based upon the submissions of the parties, it is the conclusion of the Court that the ~~conduct made the basis of Plaintiff's claim is arguably protected by the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* and is therefore preempted by that statue.~~ [Motions for Partial Summary Judgment should be granted. P. D.] [Handwritten entry]

Based upon the foregoing, IT IS HEREBY ORDERED that Defendant Local 657's Motion for Partial Summary Judgment is hereby GRANTED and Count III of Plaintiff's Original Petition is hereby DISMISSED as to all Defendants.

SIGNED THIS 24th DAY OF February, 2000.

Paul Davis (Original signed)
DISTRICT JUDGE

APPENDIX B

COURT OF APPEALS
FOR THE
THIRD DISTRICT OF TEXAS
P.O. BOX 12547, AUSTIN, TEXAS 78711-2547
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DIANE O'NEAL, CLERK

Date:	March 29, 2001
Case Number:	03-00-00390-CV
Trial Court No.:	99-11702-A
Style:	Overnite Transportation Company v. International Brotherhood of Teamsters, AFL-CIO, and Teamsters Local Union 657

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TEXAS COURT OF APPEALS,
THIRD DISTRICT,
AT AUSTIN

JUDGMENT RENDERED MARCH 29, 2001

No. 03-00-00390-CV

OVERNITE TRANSPORTATION COMPANY,
Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,
and
TEAMSTERS LOCAL UNION 657,
Appellees.

APPEAL FROM 201ST DISTRICT COURT OF
TRAVIS COUNTY BEFORE CHIEF JUSTICE ABOUSSIE,
JUSTICES B. A. SMITH AND PATTERSON
REVERSED AND REMANDED—
OPINION BY JUSTICE PATTERSON

THIS CAUSE came on to be heard on the record of the court below, and the same being considered, because it is the opinion of this Court that there was error in the trial court's summary judgment: IT IS THEREFORE considered, adjudged and ordered that the summary judgment of the trial court is reversed, and the cause is remanded for further proceedings. It is FURTHER ordered that the appellees pay all costs relating to this appeal, both in this Court and the court below; and that this decision with a copy of the opinion herein delivered be certified below for observance.

TEXAS COURT OF APPEALS,
THIRD DISTRICT,
AT AUSTIN

No. 03-00-00390-CV

OVERNITE TRANSPORTATION COMPANY,
Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

and

TEAMSTERS LOCAL UNION 657,
Appellees.

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
201ST JUDICIAL DISTRICT NO 991-11702-A,
HONORABLE PAUL DAVIS, JUDGE PRESIDING

Overnite Transportation Company appeals the trial court's summary judgment denying its claim for tortious interference with business contracts and relationships against appellees International Brotherhood of Teamsters, AFL-CIO, and Teamsters Local Union 657. Overnite presents two issues on appeal. We reverse the trial court's judgment.

Overnite sued the appellees for defamation and tortious interference arising from the appellees' efforts to organize its employees. Overnite alleged that as part of a campaign to induce its employees to join the Teamsters and to designate a local labor union affiliated with the Teamsters as their collective bargaining representative, the appellees circulated a defamatory flier to Overnite's customers in Texas. According to Overnite, the flier falsely stated that the National Labor Relations Board had found Overnite guilty of

hundreds of labor law violations, including discrimination, intimidation, and retaliation against workers. Overnite alleged that publishing the defamatory flier to its customers injured its business relationships and contracts.

Both appellees moved for summary judgment on the tortious interference claim, asserting that their acts were justified and that the National Labor Relations Act preempted Overnite's claim. The trial court granted the motions without stating its ground and severed the tortious interference claim, making the partial summary judgment final for appeal.

As movants relying on the defenses of justification and preemption, the appellees assumed the burden to conclusively prove all essential elements of each defense. *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex. 1972). On appeal, we must consider as true all evidence favorable to Overnite and indulge every reasonable inference and resolve any doubt in Overnite's favor. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). Because the court rendered a general summary judgment, Overnite must show on appeal that the appellees established neither ground as a matter of law. *Thomson v. Norton*, 602 S.W.2d 473, 477 (Tex. Civ. App.—Dallas 1980, no writ).

In its first issue, Overnite argues that because a fact questions remains on whether the appellees had a good faith claim to a colorable legal right, the court erred in rendering summary judgment on its tortious interference claim. The appellees asserted in their summary motions that they had a federally protected right to engage in the conduct forming the basis of Overnite's claim.

A defendant sued for tortious interference with contract can prevail by establishing the affirmative defense of justification. *Texas Beef & Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996). The justification defense is based on the exercise of either (1) one's own legal rights or (2) a good-faith claim to a

colorable legal right, even though that claim ultimately proves to be mistaken. *Id.* at 211. But methods tortious in themselves are unjustified, and liability is appropriately imposed on a defendant who invades another's contract rights using violence, threats and intimidation, defamation, misrepresentation, unfair competition, or bribery. *Prudential Ins. Co. of Am. v. Financial Review Servs., Inc.*, 29 S.W.3d 74, 81 (Tex. 2000). In addition, legal malice negates the justification defense. *Texas Beef & Cattle Co.*, 921 S.W.2d at 210. Overnite pleaded here that the appellees published the defamatory flier maliciously, so as to interfere with Overnite's contracts and business relationships wrongfully and without justification.

Both appellees admitted in their summary judgment motions, that for the purpose of the motions only, certain allegations of Overnite's petition were true. Specifically, the appellees admitted:

> The [appellees], in publishing the defamatory Flier to Overnite customers, have wrongfully and without justification interfered with these contracts and Overnite's business relationships with its customers. Moreover, [the appellees] published the defamatory Flier to Overnite's customers with the specific intent of wrongfully inducing the customers to breach their contracts with Overnite and to cease using Overnite's services.
>
> Despite a duty to Overnite to not tortiously interfere with Overnite's business contracts and relationships, [the appellees] maliciously and intentionally published the Flier for the purpose of wrongfully injuring Overnite's business.

(Parenthetical information omitted.) By admitting that the flier was defamatory, that they published it maliciously, that they interfered wrongfully and without justification, and that their purpose was to wrongfully induce Overnite's customers

to breach their contracts, the appellees failed to establish conclusively their defense of justification. We sustain Overnite's first issue.

Overnite contends in its second issue that the trial court erred by granting summary judgment on the ground of preemption. The Supreme Court has stated the general rule for deciding when the National Labor Relations Act preempts a state claim: "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).[1] Courts applying *Garmon* examine separately the arguably protected nature of the activity under section 7 and the arguably prohibited nature under section 8. *E.g., Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 190 (1978). In moving for summary judgment based on preemption, the appellees presented a two-part argument; they reasoned first that a union's peaceful persuasion of an employer's customers is protected by federal labor law, and second, that Overnite's tortious interference claim, based on peaceful persuasion, is preempted. We determine that the ground of preemption, as the appellees have presented it, is legally insufficient to support the summary judgment.

First, the appellees' assertion in their motions that Overnite's claim is preempted because it is based on the appellees' peaceful persuasion of Overnite's customers is

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[1] Sections 7 and 8 of the National Labor Relations Act are codified as sections 157 and 158 respectively of Title 29 of the United States Code. *See* Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 157, 158 (West 1998). Section 157 of the Act confers rights on employees regarding labor organizations, while section 158 describes unfair labor practices by both employers and labor organizations. *Id.*

too broad. The appellees failed to tailor their ground to Overnite's specific allegation that they tried to persuade by distributing defamatory fliers. To obtain summary judgment, the appellees were required to show that handbilling based on defamatory statements is protected. To ask the trial court to determine whether peaceful handbilling during a labor dispute is federally protected would not resolve the factual contention pleaded by Overnite. Because the appellees' ground failed to meet Overnite's claim as pleaded, their ground cannot support the summary judgment. *Cook v. Brundidge, Fountain, Elliott & Churchill*, 533 S.W.2d 751, 759 (Tex. 1976).

Second, the appellees based their claim of preemption on the "arguably protected," rather than the "arguably prohibited," prong of *Garmon*. The "arguably protected" prong corresponds to section 157 of the United States Code, which addresses the rights of employees to join labor organizations and participate in organized activities. *See* 29 U.S.C.A. § 157 (West 1998). Yet the cases the appellees rely on analyze, not whether union activities are protected under section 157, but whether certain labor union activities are prohibited under section 158. *E.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 588 (1988); *George v. National Ass'n of Letter Carriers*, 185 F.3d 380, 392 (5th Cir. 1999); *cert. denied*, 528 U.S. 1156 (2000). While the considerations justifying preemption under each prong overlap, the prongs differ in significant respects and merit separate analyses. *Sears, Roebuck & Co.*, 436 U.S. at 190. By failing to articulate a cogent legal basis for preemption, the appellees have not carried their burden to show that they are entitled to judgment on that ground as a matter of law. We therefore sustain Overnite's second issue.

Because the appellees failed to establish conclusively their right to prevail based on either justification or preemption, we reverse the trial court's summary judgment and remand the cause for further proceedings.

Jan P. Patterson, Justice

Before Chief Justice Aboussie, Justices B. A. Smith and Patterson

Reversed and Remanded

Filed: March 29, 2001

Do Not Publish

APPENDIX C

THE SUPREME COURT OF TEXAS
Post Office Box 12248
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September 20, 2001

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Austin, TX 78701-4042

RE: Case Number 01-0393
Court of Appeals Number: 03-00-00390-CV
Trial Court Number: 99-11702-A

Style: INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO and TEAMSTERS LOCAL UNION 657
v.
OVERNITE TRANSPORTATION COMPANY

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above-styled case.

Sincerely,

John T. Adams, Clerk

by Tanya R. Hunter (Original signed)
Tanya R. Hunter, Deputy Clerk

cc: Ms. Diane O'Neal, Clerk
Ms. Amalia Rodriguez-Mendoza
Mr. Craig T. Boggs
Mr. Brian V. Alcala

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, Title 29 U.S.C. Section 157 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 158(b)(4) of the National Labor Relations Act, Title 29 U.S.C. Section 158(b)(4) states in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> . . .
>
> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in

the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

. . .

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;